Supreme Court, U. S.
FILED
DEC 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-793

LOCAL 254, GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO, CORNELIUS KLOET, JAMES SCHAEFFER, ROBERT BRENNEN, ROBERT ANDERSON, KENNETH A. KUSTERS, ROBERT L. PHILOPULOUS AND JACK L. CHRISTIAN,

Petitioners,

vs.

WESTERN PUBLISHING COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EUGENE COTTON,
IRVING M. KING,
RUSSELL WOODY,
One IBM Plaza, Suite 4750
330 North Wabash Avenue,
Chicago, Illinois 60611,
Attorneys for Petitioners.

Of Counsel:
COTTON, WATT, JONES, KING & BOWLUS,
One IBM Plaza, Suite 4750
330 North Wabash Avenue,
Chicago, Illinois 60611

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565 56

INDEX

AUTHORITIES CITED

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

LOCAL 254, GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO, CORNELIUS KLOET, JAMES SCHAEFFER, ROBERT BRENNEN, ROBERT ANDERSON, KENNETH A. KUSTERS, ROBERT L. PHILOPULOUS AND JACK L. CHRISTIAN,

Petitioners,

vs.

WESTERN PUBLISHING COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Local 254, Graphic Arts International Union, AFL-CIO, Cornelius Kloet, James Schaeffer, Robert Brennen, Robert Anderson, Kenneth A. Kusters, Robert L. Philopulous and Jack L. Christian,[1] pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in *Western Publishing*

1. The individual petitioners were defendants in the district court and were named as parties to the appeal. Despite this, the district court's dismissal of the damage claim against the individuals was not challenged on appeal and the Court of Appeals stated that only the damage claim was before it. However, the individuals have an interest in the questions presented herein to the extent, if any, that the claim for equitable relief has not been abandoned or become moot.

Company, Inc. v. *Local 254, Graphic Arts International Union, et al.*, on September 4, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, Judge Cummings concurring in the result, is reported at 522 F. 2d 530 and is reproduced in the Appendix hereto, *infra*, pp. A1-8. The decision and order of the United States District Court for the Eastern District of Wisconsin is reported in 75 CCH Labor Cases ¶ 10,511 (1974) and is reproduced in the Appendix hereto, *infra*, pp. A8-11.

JURISDICTION

The decision of the Court of Appeals was entered September 4, 1975, reversing the decision and order of the district court dated August 7, 1974, and remanding the cause for further proceedings. Jurisdiction of this Court is conferred by 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Where a collective bargaining agreement provides that employees may refuse to perform "struck work" notwithstanding a no-strike clause, is the agreement breached when employees refuse to perform work without first confirming by arbitration that the work is struck work within the meaning of the agreement, even though the employees would be required to perform the work pending arbitration and the work might be wholly or partially completed before an arbitrator's award could be received?

2. Does the national labor policy favoring arbitration operate as a canon of construction in the interpretation of collective bargaining agreements, in derogation of the expressed intention of the parties to the agreement?

3. Do the decisions of this Court in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235 (1970) and *Gateway Coal Company* v. *United Mine Workers of America*, 414 U. S. 368 (1974) require the holding that the exercise of a contractual right, where the circumstances requisite for its exercise are in dispute, without first submitting the dispute to arbitration, constitutes a breach of contract giving rise to a claim for damages under § 301 of the Labor-Management Relations Act of 1947, 29 U. S. C. § 185, as distinguished from merely establishing the basis for possible injunctive relief notwithstanding the provisions of Section 4 of the Norris-LaGuardia Act, 29 U. S. C. § 104.

STATUTE INVOLVED

The statute involved is § 301(a) of the Labor-Management Relations Act of 1947, 29 U. S. C. § 185(a), which provides in pertinent part:

> Section 301(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Background

Western Publishing Company, Inc. (hereinafter referred to as "the Company") is a Wisconsin corporation engaged in the business of commercial printing and publishing at various locations in the eastern and midwestern United States, including, at the time covered by the complaint in this case, facilities in Racine, Wisconsin and Hannibal, Missouri. For many years

prior to the incidents which are the subject matter of the complaint, the Company's lithographic production and bookbinding employees at both Racine and Hannibal were represented for purposes of collective bargaining by local unions affiliated with the Graphic Arts International Union, AFL-CIO (hereinafter "the GAIU"), and its predecessor internationals, the Lithographers and Photoengravers International Union and the International Brotherhood of Bookbinders.[2] Specifically, lithographic production and bookbinding employees at Racine were represented by GAIU Locals 254 (hereinafter "Local 254" or "the Union") and 223-B, respectively, and Hannibal lithographic production and bookbinding employees were represented by GAIU Locals 237 and 123-B, respectively.

The Strike at Hannibal

The collective bargaining agreements between Locals 123-B and 237 and the Company in Hannibal expired by their terms on September 30th and December 31, 1972 and negotiations continued into the spring of 1973 with no new agreements being reached. On April 3, 1973, Locals 237 and 123-B commenced a lawful, primary strike at the Hannibal plant and established and maintained picket lines there.

The "Struck Work" Dispute at Racine

On May 8, 1973, Company representatives at the Racine plant, whose operations were not effected by the Hannibal strike, informed officers of Local 254 that the Company contemplated assigning to Racine employees work on a magazine known as *Easyriders*, a job which had been customarily performed in Hannibal. The Union officers pointed out that the collective bargaining agreement between the Company and Local 254

2. Effective on Labor Day, 1972, the Lithographers and Photoengravers International Union, AFL-CIO, merged with the International Brotherhood of Bookbinders, AFL-CIO, to form the Graphic Arts International Union.

prohibited the assignment of work which originated from plants struck by GAIU locals and gave employees the right to refuse to perform it. They took the position that the *Easyriders* job was "struck work" within the meaning of the collective bargaining agreement and that, therefore, employees covered by the agreement could not be required to perform such work.[3] The Company, of course, claimed that the work was not "struck work" and that the Racine employees were required to perform it if assigned to them. Factually, the dispute turned upon the Company's contention that it had decided permanently to close the Hannibal facility. Local 254 representatives expressed themselves sceptical of that contention and argued that, in any event, as of May, 1973, the strike was still in progress in Hannibal and the Company was continuing its production operations there with nonstriking employees who crossed the picket lines.

3. The provisions on struck work are as follows:

ARTICLE 18. STRUCK WORK.

The Company agrees that it will not render production assistance to any employer, any of whose plants is struck by any local of the Lithographers and Photoengravers International Union or by the International, or where members of any such local or the international are locked out, by requiring the employees covered by this contract to handle any struck work farmed out directly or indirectly by such employer, other than work which the Company herein customarily has performed for the employer involved in such strike or lockout. The Union through its officers will inform or advise the Company and its membership as to struck work.

ARTICLE 19. RIGHT TO TERMINATE.

In the event the Company requests any employee to handle any work described in the Struck Work clause, the Union, in addition to the other rights and remedies the employees and the Union have under this contract or the law, shall have the right in its discretion to terminate the contract forthwith by giving written notice to the Company.

ARTICLE 20. INDIVIDUAL RIGHT OF EMPLOYEE.

The Company agrees that it will not discharge, discipline or discriminate against any employee because such employee refuses to handle any work of the type described in the Struck Work clause.

On May 14, 1973, the Company assigned work on the *Easyriders* job to its Racine lithographic employees. Those employees refused to perform the work on the grounds that the work was "struck work" within the meaning of the contract. This action ensued.

Proceedings in the District Court.

On the afternoon of May 14, 1973, the same day the refusal to perform the *Easyriders* job occurred, the Company filed in the United States District Court for the Eastern District of Wisconsin its complaint under § 301 of the Labor-Management Relations Act of 1947, 29 U. S. C. § 185, for injunctive relief. Simultaneously, it filed a motion for temporary restraining order against the refusal. On May 17, 1973, the District Court denied the motion for temporary restraining order on equitable grounds, holding that the Company had made no showing that its legal remedies were inadequate. Thereafter, on August 8, 1973, the Company amended its complaint to add a prayer for damages in the claimed amount of $65,000.00.

The complaint alleged in substance that Local 254 had refused to allow employees represented by it to perform the *Earyriders* job because it was "struck work," that the issue whether *Easyriders* actually constituted "struck work" was subject to resolution in the contractual grievance procedure which Local 254 had not invoked, and that the refusal to perform the work violated the no-strike clause of the agreement.[4]

4. The no-strike clause of the agreement reads as follows:

ARTICLE 23. STRIKES AND LOCKOUTS.

Section 1. There shall be no strikes, stoppages, slow-downs, or general concerted action to interfere with the quality and quantity of production required by the Company and its customers during the term of this contract, except as otherwise provided under this contract.

Section 2. There shall be no lockout by the employer.

Section 3. In the event of the occurrence of any of the prohibited acts referred to in Section 1 of this article, the Union agrees promptly and publicly, to repudiate such action, to order the employees to abandon such acts and to continue production, and the Union further agrees to take such other action which it deems reasonable and appropriate to bring about compliance with the terms of this agreement. The Company will meet with the Union to resolve the dispute within twenty-four (24) hours after work is progressing in a normal way.

Section 4. The Company will have the sole and complete right to immediately discharge any employee so participating, and he may be subject to the loss of any benefits that may have accrued to him under the terms of this contract. However, such employee shall have recourse to the grievance procedure set forth in Article 24 of this Agreement.

Section 5. The Company agrees that in the event of the occurrence of any of these prohibited acts during the life of this agreement, there shall be no liability on the part of the Local Union of any of its officers or agents unless such action has been approved and ordered officially by both the Local and by the International in accordance with their constitutional requirements.

Local 254 filed an answer admitting that individual employees refused to perform the *Easyriders* work on the grounds that the work was "struck work," that the question whether the assigned work constituted "struck work" was, at the option of the Union, subject to resolution in the grievance procedure, and that the grievance procedure had not been invoked. It denied that it had instructed any employee to refuse to perform the work, and denied that the grievance procedure constituted the employees' sole recourse under the agreement. As an affirmative defense, Local 254 asserted that *Easyriders* was "struck work" within the meaning of the agreement.

On August 7, 1974, the District Court denied the Company's motion for partial summary judgment on the issue of liability and entered summary judgment in favor of Local 254. The District Court rejected the Company's argument that the refusal to perform the claimed "struck work" without first filing a grievance constituted a "breach of the Agreement and its dispute settling procedure," irrespective of whether the work was or was not "struck work" in fact. Instead, the Court held, the right to refuse to perform struck work "comes within the '. . .

except as otherwise provided under this contract' language of the 'no-strike' provision," (App., p. A10) and the exercise of that right is not dependent upon the prior invocation of the grievance procedure.

The Decision of the Court of Appeals.

The Court of Appeals reversed the decision of the District Court, holding that the refusal to perform the claimed struck work without first resolving by arbitration the dispute over the character of the work constituted a breach of the no-strike clause of the collective bargaining agreement. In so holding, the Court of Appeals stated that "the policy of the law favoring arbitration and the peaceful resolution of labor disputes . . . would not be fostered if the contract were interpreted so that the Union could direct economic force at an arbitrable issue" (App., p. A5). The Court of Appeals further held, however, that the Company has suffered no damage unless it was ascertained that the *Easyriders* job was, in fact, not struck work. It remanded the case to the district court for determination of that issue.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is in Conflict with Applicable Decisions of This Court.

Without any discussion or consideration of the intention of the contracting parties or the normal principles of construction, and without analysis of the meaning and relationship of the applicable contract provisions, the Court of Appeals has construed the agreement of the parties to prohibit a refusal to perform struck work without prior arbitration of the character of the disputed work. This departure from the normal judicial approach to the interpretation of contracts is justified by the court on the ground that the national labor policy favoring arbitration is not "fostered" by an interpretation of the con-

tract permitting the Union to "direct economic force at an arbitrable issue" (App., p. A5). Once it is conceded that the question whether, under the specific circumstances then prevailing, *Easyriders* was "struck work" is an arbitrable question, the matter is resolved, according to the Court of Appeals; considerations of national labor policy preclude employee refusals to perform the work until the arbitration process has confirmed that the work is in fact struck work. Since the Court did not analyze the contractual provisions involved, these policy considerations apparently are regarded as controlling regardless of what the parties have provided in their agreement. The policy of favoring arbitration is thus elevated to a principle of law defeating the contractual intentions of private parties.

This approach to the interpretation of collective bargaining agreements is flatly contrary to the holding of this Court in *Gateway Coal Company* v. *United Mine Workers,* 414 U. S. 368 (1974). There the Court said (414 U. S. at 382):

> [A]n arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties. It would be unusual, but certainly permissible for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. . . . Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application.

Thus, under *Gateway Coal,* the preference for "arbitration and the peaceful resolution of labor disputes", as the Seventh Circuit termed it, finds expression in the rule that the no-strike clause will normally be construed as coextensive with the arbitration clause. But the Court made clear that, while this rule was generally applicable in the absence of a contrary expression of intention, it did not operate to defeat the expressed intention of the parties.

There is no question here that the parties have expressly excepted refusals to perform struck work from the coverage of the no-strike clause, as permitted under *Gateway Coal*. The Seventh Circuit itself recognized that to be the case (App., p. A4). Nevertheless, the court held, if there is a dispute as to whether or not specific work is or is not "struck work", the no-strike clause obliges the Union to resolve that dispute by arbitration prior to any refusal to perform it. Union arguments that such an interpretation operated to defeat the intentions of the parties and to render nugatory the struck work provisions were characterized as "misdirected" because they were addressed to equitable considerations relevant in consideration of injunctive relief under *Boys Markets, Inc.* v. *Retail Clerk Union, Local 770*, 398 U. S. 235 (1970).[5] But these arguments bear directly on the proper construction of the agreement.

Article 23 of the collective bargaining agreement proscribes strikes and work stoppages "except as otherwise provided under this contract" and provides that employees who participate in such activities are subject to summary discipline. The only two provisions of the agreement falling within the "except as otherwise provided" language of the no-strike clause are Article 20, which provides that employees who refuse to perform struck work may not be disciplined for such refusal, and Article 22,[6] which, in substantially similar terms, precludes disciplinary action against employees who honor picket lines. Further,

5. This pronouncement is somewhat startling in view of the fact that four of the six cases cited by the court are cases dealing with the propriety of *Boys Markets* injunctions.

6. Article 22 reads as follows:

"Notwithstanding any other provisions of this contract, the Company agrees that it will not discharge, discipline or otherwise discriminate against any employee who refuses to pass through a picket line established at the plant, during an authorized strike, by any other union having jurisdiction in the plant. An authorized strike is understood to be one occurring after the expiration, or legal termination, of a contract with Western Publishing Company and which has been approved and sanctioned by the local and international of the striking union.

Article 19 of the Agreement provides that, if the Company assigns struck work, the Union has the right to terminate the entire agreement, including the no-strike clause. These provisions make clear, therefore, that the right not to perform struck work was regarded by the parties as paramount and, by the express terms of the agreement, superior to the obligation of the no-strike clause.

As a practical matter, under this agreement, the exercise of the right of refusal to perform struck work will always arise in the context of a dispute over whether or not the assigned work is, in fact, struck work. Not only would it be futile for the Company to assign work which was concedely struck work since the employees could simply refuse to perform it, it would invite the even worse calamity of the Union's termination of the entire agreement and institution of a full-scale strike. Thus, the Company will only assign work which it claims is not struck work and the Court of Appeals decision means that, each time struck work is assigned, the Union will be required to establish by arbitration that the work is in fact struck before there can be any refusal to perform it.

This requirement has the effect of destroying the right of refusal and renders superfluous the provisions of Article 20. Article 18 of the agreement prohibits the Company from requiring employees to handle struck work and defines what struck work is. The "dispute" which is to be arbitrated under the Court of Appeals decision is a dispute as to the interpretation and application of Article 18 and an arbitrator would be required to determine whether, under the specific facts, the work in question is struck work. If the arbitrator holds that the work is struck work, the necessary consequence would be to preclude the Company—by a suit to enforce the arbitration award, if necessary—from continuing to insist on its performance and from disciplining employees who decline to perform it. These consequences flow simply from the provisions of Article 18; Article 20 is not required once there has been a determination under Article 18 that any given work is struck work.

The right of refusal in Article 20, if it has any meaning, must therefore apply to refusals which occur *prior* to any resolution of the dispute about struck work. Ordinarily, absent some express contractual authorization of a refusal to obey, employees must obey work directions issued to them by their supervisors and challenge the validity of those directions in the grievance procedure. Article 20 is only meaningful as such an authorization of a refusal to obey. The construction of the Court of Appeals renders that Article meaningless.

Furthermore, in determining the intention of the contracting parties, the nature of the exceptions to the no-strike clause is of critical importance. Both the right to refuse to perform struck work and the right to honor picket lines are, by their very nature, rights in which timing is of the essence, and deferral of these rights is tantamount to their destruction. Thus, while the arbitration process moves forward, the disputed work must, if the Court of Appeals is correct, continue to be performed. In the case of the normal job in the printing industry, a few days' time will suffice for its completion. In most cases, therefore, by the time the arbitrator has issued his decision, the work will have been completed. Unlike the Company, which has an adequate damage remedy if employees refuse to perform work which is later determined not to be struck work, there is no remedy which can restore to employees their right to refuse to perform work which was completed prior to the arbitrator's decision.

It is obvious that it was precisely these considerations which motivated the parties to create the struck work exception to the no-strike clause in the first place. This intention of the parties is defeated by the Seventh Circuit's decision just as totally and effectively as if that court had straightforwardly held the exception to be void. This method of contractual interpretation is contrary to this Court's mandate in *Gateway Coal*. As a matter of fact, the court does not even succeed in its expressed purpose of fostering resolution of disputes by the

arbitral process. The consequence of the Court of Appeals decision is to permit the Company effectively to impose its view of the contract dispute on its employees by its unilateral action in the assignment of the work backed up by the sanctions of discipline and damage actions for refusal to perform. The arbitration process is made an empty procedure since the practical resolution of the struck work issue occurs when the employees are compelled to perform it.

2. The Decision Below Relied, in Part, on Decisions of the Courts of Appeals for the Third and Fourth Circuits Which Are in Conflict with Decisions of the Second and Fifth Circuits and Which Are Contrary to a Decision of This Court.

The court below cited in support of its decision the decisions in *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs, Parts and Garage Employees, Local 926*, 502 F. 2d 321 (3d Cir.) (en banc), *cert. denied*, 419 U. S. 1049 (1974) and *Wilmington Shipping Co.* v. *International Longshoremen's Association, Local 1426*, 86 L. R. R. M. 2846, 74 LC ¶ 10,129 (4th Cir.), *cert. denied*, 419 U. S. 1022 (1974). Those cases involved the propriety of injunctive relief under *Boys Markets* in the context of collective bargaining agreements which contained no-strike and arbitration clauses and clauses permitting employees to honor "primary" or "bona fide" picket lines. In both cases it was held that refusals to cross picket lines were enjoinable where it was disputed whether or not the picket lines were in fact "primary" or "bona fide" and those disputes were arbitrable. The *Wilmington Shipping* case was a *per curiam* decision following the earlier Fourth Circuit decision in *Monongahela Power Company* v. *Local 2332, International Brotherhood of Electrical Workers*, 484 F. 2d 1209 (4th Cir. 1973). Each of these cases stands for the proposition that a work stoppage is enjoinable if the propriety of that work stoppage itself is subject to arbitration, even though the "dispute" which triggered the work stoppage is not itself arbitrable. In each case, members of the de-

fendant union refused to cross picket lines established by another union. The dispute which gave rise to the picketing was one to which the defendant union was not even a party, let alone one subject to arbitration under the defendant union's contract. Only the question whether the conduct of the defendant union itself constituted a violation of the agreement was arbitrable. The conduct was enjoined in each case, purportedly on the authority of this Court's decision in *Boys Markets.*

These cases are contrary to the teaching of *Boys Markets* and in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Amstar Corporation* v. *Amalgamated Meat Cutters & Butcher Workmen,* 468 F. 2d 1372 (5th Cir. 1972). In *Boys Markets* this Court stated:

> When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect. . . . (398 U. S. at 254.) (Emphasis in original.)

The critical language is that the work stoppage must be *over* an arbitrable grievance; *it is assumed that the work stoppage itself violates the agreement. Boys Markets* stands for the proposition that a work stoppage which violates the no-strike clause of a collective bargaining agreement is enjoinable despite the provisions of § 4 of the Norris-LaGuardia Act if, and only if, the illegal work stoppage is *over* a dispute which is subject to the contractual grievance procedure. The case provides no authority for the holding in *NAPA Pittsburgh, Wilmington Shipping* and *Monongahela Power* that a work stoppage is enjoinable merely because it *may* be in violation of the contract.

The Fifth Circuit has expressly held that a refusal to cross the picket line of a stranger union is not enjoinable. *Amstar Corporation* v. *Amalgamated Meat Cutters & Butcher Workmen,* 468 F. 2d 1372 (5th Cir. 1972). That court said:

> The case *sub judice* is entirely outside the scope of the exception to the Norris-LaGuardia Act delineated in *Boys Markets.* [Citations omitted.] The strike by the Chalmette employees was not "over a grievance" which the parties were contractually bound to arbitrate. Rather, the strike itself precipitated the dispute—the validity under the Union's no strike obligation of the member-employees honoring the ILA picket line. Were we to hold that the legality of the very strike sought to be enjoined in the present situation constituted a sufficiently arbitrable underlying dispute for a *Boys Markets* injunction to issue, it is difficult to conceive of any strike which could not be so enjoined. (468 F. 2d at 1373.)

Accord: *Buffalo Forge Company* v. *United Steelworkers of America, AFL-CIO,* 517 F. 2d 1207 (5th Cir. 1975), *cert. granted,* 44 U. S. L. W. 3234 (Oct. 20, 1975) (Sup. Ct. Doc. No. 75-339); *United States Steel Corp.* v. *United Mine Workers,* ..... F. 2d ....., 77 CCH Labor Cases ¶ 11,093 (5th Cir. 1975); *Plain Dealer Publishing Co.* v. *Cleveland Typographical Union,* ..... F. 2d ....., 77 CCH Labor Cases ¶ 11,065 (6th Cir. 1975); *cf. Hyster Company* v. *Independent Towing & Lifting Machine Association;* 519 F. 2d 89 (7th Cir. 1975); and see, *Gary-Hobart Water Corp.,* 210 NLRB No. 87 (1974), *enf'd,* 511 F. 2d 284 (7th Cir. 1975). *Contra, Valmac Industries, Inc.* v. *Food Handlers Local 425,* 519 F. 2d 263 (8th Cir. 1975).

The interpretation of *Boys Markets* reflected in *NAPA Pittsburgh* and *Monongahela Power* is taken a step further by the decision of the court below in the instant case. Those cases hold that conduct is *enjoinable* where it is arguably in violation of the agreement and where its propriety is determinable in arbitration; here the Court of Appeals has held, in effect, that, whenever a work stoppage is enjoinable under that interpretation, it constitutes an actionable breach of the agreement. The agreement is held to be breached by the mere failure to establish through arbitration the existence of all the factual prerequisites to the exercise of an admitted contractual right. In this case it means that the Union has breached the agreement even though

it may ultimately be determined that the disputed work was "struck work" all along.

The decision below mirrors the confusion in the courts of appeals as to the scope of *Boys Markets*. Already this term the Court has passed on at least four petitions for certiorari in cases of the kind here relied on by the Seventh Circuit.[7] The Court has granted review in *Buffalo Forge Company* v. *United Steelworkers of America, supra,* which presents directly the question whether *Boys Markets* authorizes injunctions in the case of work stoppages which violate, or may be determined in arbitration to violate, a no-strike clause but which are not "over" an arbitrable grievance. That case arises in the context of stranger picketing similar to the cases relied on by the court below. The instant case arises in the context of the exercise of a claimed contractual right forming an exception to the no-strike clause and presents the further and related question whether the exercise of the claimed right without prior arbitration constitutes a breach of contract in and of itself, without regard to the merits of the contractual claim of right.

Confusion reigns in the courts of appeals as to the scope of *Boys Markets*. Only an authoritative elucidation by this Court of the precise limits of that decision can rectify the situation. The issues involved are central to the administration of the national labor policy and of the utmost importance in the operation of the collective bargaining process and urgently command the attention of this Court.

7. In addition to the *Buffalo Forge* case referred to in the text, petitions for certiorari have been denied in *Philadelphia Food Drivers* v. *Fox Transport System,* Doc. No. 74-1524; *United Mine Workers* v. *Island Creek Coal Co.,* Doc. No. 74-1573; *United Mine Workers* v. *Armco Steel Corp.,* Doc. No. 74-1574.

CONCLUSION

Petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

EUGENE COTTON,
IRVING M. KING,
RUSSELL WOODY,
One IBM Plaza, Suite 4750
330 North Wabash Avenue,
Chicago, Illinois 60611,
Attorneys for Petitioners.

Of Counsel:
COTTON, WATT, JONES, KING & BOWLUS,
One IBM Plaza, Suite 4750
330 North Wabash Avenue,
Chicago, Illinois 60611.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 74-1832

WESTERN PUBLISHING COMPANY, INC.,
Plaintiff-Appellant,

vs.

LOCAL 254, GRAPHIC ARTS INTERNATIONAL UNION, CORNELIUS KLOET, JAMES SCHAEFFER, ROBERT BRENNEN, ROBERT ANDERSON, KENNETH A. KUSTERS, ROBERT L. PHILOPULOUS, and JACK L. CHRISTIANSEN,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin—No. 73 C 259
MYRON L. GORDON, *Judge*

ARGUED APRIL 21, 1975—DECIDED SEPTEMBER 4, 1975

Before CASTLE, *Senior Circuit Judge,* CUMMINGS and SPRECHER, *Circuit Judges.*

CASTLE, *Senior Circuit Judge.* Plaintiff Western Publishing Company, Inc. filed a complaint under § 301 of the Labor Management Relations Act of 1947, 29 U. S. C. § 185, alleging that defendant Local 254, Graphic Arts International Union, and certain individual defendants who at the time of filing were

officers and members of Local 254, violated the no-strike and grievance and arbitration provisions of the collective bargaining agreement when they engaged in a work stoppage by refusing to handle what the defendants claimed was struck work. The complaint sought injunctive relief, and as amended, damages. Injunctive relief was denied, and subsequently, the district court granted summary judgment in favor of the Union on the issue of damage liability,[1] concluding that there was no breach of the collective bargaining agreement. On appeal, only denial of the damage claim is before us, and we reverse and remand.

I.

Western Publishing Company is engaged in the printing and publishing business and has plant locations at Racine, Wisconsin, and Hannibal, Missouri. On April 3, 1973 Locals 237 and 123-B, Graphic Arts International Union, representing lithographic production and bindery employees, struck the Hannibal plant. According to the Company, it began to shutdown the Hannibal facility, and as a result, work scheduled at that plant had to be performed elsewhere. Work on the magazine "Easyriders" was assigned to the Racine plant, and was to commence on May 8, 1973.

Defendant Local 254 represents employees engaged in work related to lithographic printing at the Racine plant. The collective bargaining agreement between Local 254 and the Company contained no-strike and arbitration clauses.[2] It also contained

1. The district court had previously sustained a motion to dismiss the Company's complaint to the extent that damages were sought against the individual defendants, and that dismissal is not challenged here.

2. The relevant parts of those clauses provided:

ARTICLE 23. STRIKES AND LOCKOUTS

SECTION 1. There shall be no strikes, stoppages, slowdowns, or general concerted action to interfere with the quality and quantity of production required by the Company and its customers during the term of this contract, except as otherwise provided under this contract.

* * *

(Footnote continued on next page)

provisions which prohibited the Company from requiring employees to handle struck work, and from taking disciplinary action against any employee who refused to handle such work.[3] Recognizing that there might exist a dispute as to the status of the Easyriders work, the Company delayed production, and between May 8 and May 14 the Company and Union engaged in a series of conversations concerning assignment of that work to members of Local 254. The Company contended that Easyriders was not struck work, and maintained that if a question

ARTICLE 24. GRIEVANCE PROCEDURE—ARBITRATION

SECTION 1. In the event an individual has a question or grievance, he first will go to his foreman or supervisor in order to get an answer or a satisfactory understanding.

* * *

SECTION 6. Should the joint committee be unable to agree within ten days, then it will refer the matter to the American Arbitration Association for arbitration under their normal procedures, provided such dispute involves interpretation of this Agreement or the failure of the parties to reach an agreement relative to any grievance coming within the provisions thereof, except wages. The decision of the arbitrator shall be final and binding on both parties, provided that local union laws not affecting wages, hours, or working conditions and the laws of the International shall not be subject to arbitration.

3. Those provisions read as follows:

ARTICLE 18. STRUCK WORK

The Company agrees that it will not render production assistance to any employer, any of whose plants is struck by any local of the Lithographers and Photoengravers International Union or by the International, or where members of any such local or the International are locked out, by requiring the employees covered by this contract to handle any struck work farmed out directly or indirectly by such employer, other than work which the Company herein customarily has performed for the employer involved in such strike or lockout. The Union through its officers will inform or advise the Company and its membership as to struck work.

ARTICLE 20. INDIVIDUAL RIGHT OF EMPLOYEE

The Company agrees that it will not discharge, discipline or discriminate against any employee because such employee refuses to handle any work of the type described in the Struck Work clause.

existed as to the application of the struck work provisions, the proper procedure would be to arbitrate the issue pursuant to the grievance and arbitration provisions of the contract. The Company also offered to expedite the arbitration process.

Unable to make any headway, on May 14 the Company assigned the Easyriders work to its employees. The Union's position was that Easyriders was struck work, and as a result, members of Local 254, after consultation with the Union, refused to begin work on that job. One member who had begun working on Easyriders that morning ceased his work after being informed by a Union department representative that Easyriders was struck work.[4] Further, the Union refused to delay its work stoppage pending the outcome of arbitration, and no member of the Union filed a grievance with respect to the assignment of the Easyriders work.[5] On the afternoon of May 14, the Company filed its § 301 action.

II.

We note first what is *not* in dispute. Both parties agree that the struck work provisions form an exception to the no-strike clause. The parties also agree that what constitutes struck work is an arbitrable issue. The Company contends, however, that the members of the Union are not free to exercise the

4. The Union argues that it is not responsible for the work stoppage because although its members admittedly consulted with it concerning the Easyriders job, it did not instruct any member not to perform the work. Each member, it contends, individually elected not to work on Easyriders. Suffice it to say that we need not blindfold ourselves to reality, and that the "consultations" here establish the responsibility of the Union.

5. The arbitration clause in the agreement is geared toward redressing employee grievances. *See* note 2 *supra*. The fact that no grievance was filed here, however, does not prevent the employer from contending that the arbitration provisions are triggered if the Union members also employ self-help. Were it otherwise, the effect of the no-strike clause could always be avoided by the Union's failure to file a grievance.

right to refuse to handle struck work until it is determined through arbitration that the work is, in fact, struck work. The Union, on the other hand, argues that the exercise of its right is not dependent upon the *prior* invocation of the arbitration procedure.

We do not think that the Union can exercise its right to refuse to perform struck work until the dispute over the character of the work is first resolved. Since the issue of what constitutes struck work is admittedly arbitrable, the policy of the law favoring arbitration and the peaceful resolution of labor disputes, *see Gateway Coal Co.* v. *United Mine Workers*, 414 U. S. 368, 386 (1974); *Local 81, American Federation of Technical Engineers* v. *Western Electric Co.*, 508 F. 2d 106, 108 (7th Cir. 1974), would not be fostered if the contract were interpreted so that the Union could direct economic force at an arbitrable issue. Although according to the Union's position arbitration would later occur, if the work was determined not to be struck work, then an unnecessary resort to force has occurred.

A similar result has been reached in *NAPA Pittsburgh Inc.* v. *Automotive Chauffeurs, Parts and Garage Employees, Local 926*, 502 F. 2d 321 (3rd Cir.) (en banc), *cert. denied*, 419 U. S. 1049 (1974) and *Wilmington Shipping Co.* v. *International Longshoremen's Association, Local 1426*, 86 L. R. R. M. 2846 (4th Cir.), *cert. denied*, 419 U. S. 1022 (1974). In those cases the collective bargaining agreements contained no-strike and arbitration clauses, and also exceptions to the no-strike clauses which permitted employees to refuse to cross a "primary" (*NAPA Pittsburgh*) or a "bona fide" (*Wilmington Shipping*) picket line. From the fact that in both cases the dispute as to the validity of the picket line fell within the scope of the arbitration clauses, it was concluded that exercise of the employees' right to refuse to cross the picket line must first await

resolution by arbitration of the "validity" dispute.[6] Thus, the court in *Wilmington Shipping, supra,* at 2847 stated:

> [W]hile the contract gives the longshoremen the right to respect bona fide picket lines, there is a factual dispute over the bona fides of this picket line. Everyone agrees the factual dispute is arbitrable under the contract. Until that issue is resolved in arbitration, it is an open question whether observance of the picket line is authorized by the contract.

See also NAPA Pittsburgh, supra, at 324.

The Union argues, however, that a conclusion that its right to refuse to perform struck work is deferred is equivalent to a destruction of that right since it would be too late to apply a decision in its favor to work already performed while awaiting the outcome of the arbitration process. The Union contends that the threat of discipline to its members would substantially inhibit invocation of the right of refusal where it was not absolutely certain that the work was struck work, and that in any event, if its interpretation of the character of the work is incorrect, any harm to the Company is compensable in damages. On balance, therefore, the Union urges that in order to preserve its right, it should be permitted to exercise it prior to a determination of the status of the work.

6. The text of the arbitration clause in *Wilmington Shipping* is not set forth. However, in *Gary Hobert Water Corp.* v. *NLRB,* 511 F. 2d 284 (7th Cir.), *petition for cert. filed,* 44 U. S. L. W. 3086 (U. S. July 11, 1975) and *Hyster Co.* v. *Independent Towing and Lifting Machine Association,* Slip. op. Nos. 75-1066 and 1068 (7th Cir., July 7, 1975) we concluded that arbitration clauses with language similar to the arbitration clause in *NAPA Pittsburgh* did *not* include as an arbitrable issue refusals to cross another union's picket lines. *But compare Inland Steel Co.* v. *Local 1545, United Mine Workers of America,* 505 F. 2d 293 (7th Cir. 1974). Consequently, we utilize *Wilmington Shipping* and *NAPA Pittsburgh* only to the extent that they also conclude that if the issue on which an exception to the no-strike clause depends *is* arbitrable under the contract, then the contract requires that arbitration must first take place. Those cases also upheld issuance of injunctions against the unions, but that issue is not before us. *See* text *infra.*

These arguments, however, are misdirected because they are addressed to equitable considerations relevant to the issue of a *Boys Markets* injunction, [*Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U. S. 235 (1970)] rather than to a determination of whether the dispute here is first arbitrable under the contract. The Union's arguments apparently do contain the underlying assumption that we must evaluate these equitable considerations because it follows from the fact that the contract first requires arbitration that an injunction to enjoin the work stoppage automatically follows. But that is not necessarily the case. As stated in *Boys Markets, supra,* at 253-254:

> Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance . . .
>
> ". . . [T]he District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." (Citation omitted.)

While we note that all would be happy if the arbitration process were instantaneous, and further, that "the district court has ample authority in the exercise of its equitable powers to see to it that arbitration proceeds promptly and expeditiously," *NAPA Pittsburgh supra,* at 324, we need not evaluate the Union's arguments since our conclusion is this damage action that the contract requires that the Union first arbitrate does not perforce mean that its right not to perform struck work is destroyed. The Union's arguments are more properly considered when the propriety of the issuance of an injunction is at stake.

We therefore find that the Union has breached the no-strike clause of the collective bargaining agreement. The Company

has suffered no damage, however, unless it is also ascertained that Easyriders was not struck work, and therefore a job that members of the Union were required to perform. The district court did not reach that question, and consequently, we remand for a determination of that issue.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CUMMINGS, *Circuit Judge*, concurs in the result.

UNITED STATES DISTRICT COURT,
Eastern District of Wisconsin.

WESTERN PUBLISHING COMPANY, INC., *Plaintiff,* *vs.* LOCAL 254, GRAPHIC ARTS INTERNATIONAL UNION, CORNELIUS KLOET, JAMES SCHAEFER, ROBERT BRENNEN, ROBERT ANDERSON, KENNETH A. KUSTERS, ROBERT L. PHILOPULOUS, JACK L. CHRISTIANSEN, *Defendants.*	No. 73-C-259

DECISION AND ORDER.

This is an action under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, in which the plaintiff, Western Publishing Company, Inc., seeks damages and injunctive relief with respect to a claimed "partial strike" or "work stoppage and slowdown."

Western claims that it is entitled to summary judgment because

> "[t]he answer filed by the Defendant Local 254 admits that on May 14, 1973, employee members of Local 254, upon consultation with and advice of Local 254, refused to perform [what they claim is struck] work assigned by Western."

Article 18 of the parties' collective bargaining agreement provides that "[t]he Union through its officers will inform or advise the company and its membership as to struck work." Nevertheless, Western's position is that the issue whether the work in question is "struck work"—which employees may refuse to

perform under Article 18—is subject to the "grievance procedure-arbitration" provisions set forth at Article 24. Western maintains that, regardless of whether such work is "struck work", the refusal by Local 254 member employees to perform such assignments violates the "no strike" provisions of Article 23 as well as the "grievance procedure-arbitration" provisions, thus giving it a right of recovery against the defendant.

Western appears to attach significance to the fact that the Local 254 member employees in question have not invoked the arbitration procedure by filing a grievance. At this point, however, the record indicates that the defendant union and its member employees have no grievance. Indeed, until now, Western has acquiesced in the "partial strike."

Were it to attempt to discipline any of the member employees for refusing to perform the alleged "struck work" assignments, Western would, in effect, trigger the relevant "grievance procedure-arbitration" provisions, the terms of which are geared entirely toward redressing *employee* grievances. Until battle is joined, therefore, the dispute settlement procedure set forth in Article 24 does not come into play. In my opinion, it would be inappropriate for this court to compel the parties to engage in a dispute settlement procedure which the plaintiff could itself trigger.

Based on what the plaintiff recites to be the undisputed facts, a cause of action is not stated against the defendants. In my opinion, Article 18 of the parties' collective bargaining agreement, which specifically provides that member employees need not perform "struck work", comes within the ". . . except as otherwise provided under this contract" language of the "no-strike" provision, Article 23. As noted, Article 18 entitles the defendant Local 254 to advise employee members of the existence of the claimed "struck work." In addition, Article 19 provides that:

> "[i]n the event the Company requests any employee to handle any work described in the Struck Work clause, the Union, in addition to the other rights and remedies the employees and the Union have under this contract or the law, shall have the right in its discretion to terminate the contract forthwith by giving written notice to the Company."

Given the existence of these specific contractual provisions, it is clear that the defendants' conduct to date is not actionable under § 301 and that the requisite circumstances do not as yet exist for the "grievance procedure-arbitration provisions" to come into play.

In the event that Western disciplines a member employee for his refusal to perform the claimed "struck work", such employee could file a grievance pursuant to Article 24. The issue whether the challenged assignment is "struck work" would then be ripe for resolution pursuant to the procedure outlined therein.

Were the Union's response to such disciplining by Western of a member employee to take the form of a strike (instead of utilizing the grievance arbitration procedure set forth in Article 24), such action would appear to violate the general "no-strike" provision, Article 23; in that event, Western would appear to have standing to bring a § 301 action for damages and injunctive relief to compel arbitration. It should be noted, however, that employee members could refuse to perform the alleged struck work pending the outcome of a grievance arbitration test case without fear of violating the "no-strike" provision.

Therefore, IT IS ORDERED that the plaintiff's motion for summary judgment be and hereby is denied.

IT IS ALSO ORDERED that summary judgment be and hereby is granted in favor of the defendants.

IT IS FURTHER ORDERED that this action be and hereby is dismissed.

Dated at Milwaukee, Wisconsin, this 7th day of August, 1974.

/s/ MYRON F. GORDON,
U. S. District Judge.